L.1182, CWA v. DOT, 57 OCB 31 (BCB 1996) [Decision No. B-31-96 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA

DECISION NO. B-31-96
DOCKET NO. BCB-1684-94

Petitioner,

-and-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Respondent.

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## DECISION AND ORDER

On September 30, 1994, Local 1182, Communications Workers of America ("Union") filed a verified improper practice petition against the New York City Department of Transportation ("Department" or "City"). The petition alleges that the City violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL") when it "interfered with" an attempt made by Robert Cassar ("Petitioner"), the President of the Union, to communicate with union members. The City, by its Office of Labor Relations, filed a verified answer on November 28, 1994 and the Union filed a verified reply on December 28, 1994.

## Background

At the time of the events alleged in the instant petition, the Petitioner, a Traffic Enforcement Agent ("TEA"), was on leave

without pay status from the Department in order to serve as the President of the Union. On August 26, 1994, the Petitioner visited the Department's work location at 601 West 50th Street for the purpose of addressing three commands (T-106A, T-111A, T-112A) housed there. At some point prior to August 26th, the Petitioner had met with Leon Heyward, then Deputy Commissioner of Enforcement, seeking permission to address the commands on that day; permission was granted.

However, the parties dispute the extent of the permission granted. According to the City, the Petitioner only requested permission to speak to the commands about an upcoming African-American Day parade; he was to seek volunteers and inform TEAs that they had permission to take their uniforms home for the occasion. The City maintains that the Petitioner was granted permission to address the commands for this limited purpose. According to the Petitioner, the permission granted was not restricted to any particular subject.

The City alleges that on August 26th, Allen Foster, Deputy Commissioner for Manhattan Intersections, advised Captain Mary Jenkins at the 601 West 50th Street location that the Petitioner was coming to speak to the commands about the African-American Day parade. The City asserts that Foster told Jenkins that permission to speak was limited to parade information. Upon arriving at the work location, the Petitioner spoke to the T-106A command first without incident.

The Petitioner next attempted to address the T-112A command. According to the City, the Petitioner entered the muster room of the T-112A command where roll call was in process. The Union denies that roll call was in progress. When the Petitioner began to speak, or shortly thereafter, Lieutenant Sam Irby informed the Petitioner that he was only to speak on matters pertaining to the African-American Day parade.[1] The Petitioner was then approached by Captain Jenkins, who also stated that the Petitioner was only to speak about the parade. The Petitioner objected to this limitation. The City alleges, and the Union denies, that the Petitioner stated that "if the officers asked him questions, he would answer them." At that point, the Union alleges, Jenkins began the roll call and sent the TEAs out to their assignments without permitting the Petitioner to address them further. According to the City, Jenkins "attempted to conclude the matter" by resuming roll call and assigning field patrols.

The Petitioner proceeded to the T-111A command and spoke without incident. The City alleges, and the Union denies, that within a week after the August 26th incident the Department arranged for the Petitioner to return to the work location and address the T-112A command. According to the City, the Petitioner did so without incident.

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[1] The City alleges that Irby stated that the Petitioner was only to discuss the parade "because this was not an assigned union meeting."

## Positions of the Parties

### Union's Position

The Union contends that "by its actions [in the instant case], the [Department] interfered with [the Petitioner's] attempt to communicate with his members in violation of Section 12-306 of the [NYCCBL], including but not limited to, Section 12-306 a(1), (2), (3) and (4) of that law." As a remedy, the Union requests that the Board "make Local 1182 and/or any Traffic Enforcement Agents whole for any loss of pay and/or benefits as a result of Respondent's conduct", issue a cease and desist order, and order "posting of a notice communicating the provisions of the order to bargaining unit employees."

### City's Position

As an initial matter, the City argues that the facts in this case reveal, at most, "a misunderstanding between the T-112A officers and [the Petitioner] concerning the possibility of his going beyond the officers' understanding of the limited permission granted to him." The City maintains that "while Jenkins and [Irby] were prepared to accommodate [the Petitioner's] request to solicit support for the parade, it appears that his statement concerning 'answering any questions' raised the supervisors' concern that the discussion would delay the agents going out into the field on their assignments."

The City argues that the Union has not alleged facts

sufficient to establish that the City violated §12-306a(1) of the NYCCBL. According to the City, the petition fails to establish that the Department "interfered with, restrained or coerced" the Petitioner in the exercise of his rights granted under §12-305 of the NYCCBL because there exists no right to conduct union business during working hours.

The City points out that the Board has found that an employer may restrict access to its premises when such a restriction will not prevent the union from reasonably representing its members and that the employer can refuse access unless the union establishes the necessity for access. The City argues that in the instant case, no facts were alleged to support the proposition that "soliciting volunteers for a parade is a matter crucial to the Petitioner's representation of the [traffic] enforcement agents." Moreover, the City argues, the Union has not alleged that the Petitioner had no alternative means by which to bring the parade to the attention of the TEAs. And in any event, the City contends, the Petitioner was permitted to speak with the T-112A command at a later date.

Additionally, the City argues, the Department's actions on August 26th were within its statutory managerial prerogative. Given that the misunderstanding at the T-112A command caused a disruption in the roll call, the City argues, the Department had the right to limit the Petitioner's access to the TEAs so as to ensure the continuity of service. Put differently, the City

argues that the Department had a legitimate business reason for its actions; the officers sent the TEAs out to their assignments in order to avoid further delays in the performance of their work.

The City further argues that the Union has failed to allege any facts sufficient to support a claimed violation of §12-306a(3) of the NYCCBL. The City contends that the petition does not allege that any retaliatory action was taken against the Petitioner affecting the terms and conditions of his employment, i.e., he was not disciplined, benefits were not withheld, and his leave without pay status was not revoked. Similarly, the City argues, the petition does not allege any disparate treatment of the Petitioner.

Finally, addressing the claimed violations of §§12-306a(2) and (4) of the NYCCBL, the City argues that the petition contains neither allegations of interference with the formation or administration of the Union nor a refusal to bargain in good faith.

## Discussion

The petition in this case sets forth the Union's factual allegations and states that "by its actions [in the instant case], the [Department] interfered with [the Petitioner's] attempt to communicate with his members in violation of Section 12-306 of the [NYCCBL]." Neither the petition nor the Union's

reply contains any further elaboration on the Union's claim; the Union fails to explain exactly how, in its view, the facts alleged constitute a violation of the NYCCBL. It appears that the Union is claiming that it was in some way denied access to its members. However, it is impossible to decipher whether the Union is simply claiming that the City denied access by allegedly preventing him from speaking fully about the African-American Day parade or that the City denied access by allegedly limiting the subject matter of the Petitioner's address to the African-American Day parade and denying him the opportunity to speak about other employment related issues. For the purpose of this discussion, we will assume that the Union intended to raise both of these possible claims.

In Board of Education, City School District of the City of Albany v. Albany Public School Teachers Association[2], the Public Employment Relations Board ("PERB") held that an employer may restrict access of non-employees to its premises when such restriction will not prevent an employee organization from reasonably representing its constituents and such restriction is not applied in a discriminatory manner. Moreover, PERB held, the charging party must show that it cannot properly represent its constituents because of such denial of access or in the

[2] 5 PERB ¶4521 (1972), aff'd, Board of Education, City School District of the City of Albany v. Albany Public School Teachers Association 6 PERB ¶3012 (1973).

alternative, that its non-employee members have been denied access on a discriminatory basis.[3] PERB's holding in this case was adopted by this Board in Decision No. B-30-82 and reiterated in Decision No. B-8-86.

Board of Education, City School District of the City of Albany v. Albany Public School Teachers Association defined the term 'non-employee' broadly. In that case, several teachers who were also union members sought permission to enter school buildings in which they did not teach in order to investigate possible grievances and prepare for negotiations. Because the teachers were employed at school buildings other than the ones they sought to visit, PERB deemed them to be non-employee members. In the case before us, because the Petitioner does not work at 601 West 50th Street, he is a non-employee in this context. Accordingly, the principles set forth in Board of Education, City School District of the City of Albany v. Albany Public School Teachers Association apply.

The Union has not demonstrated, or even so much as alleged,

[3] We note that the Board of Education, City School District of the City of Albany v. Albany Public School Teachers Association is factually distinguishable from the case at bar. In that case, a group of teachers sought access to inspect several schools in connection with the investigation of grievances and preparation of proposal for negotiations. PERB dismissed the improper practice petition in that case because the denial of access had not deprived the union of the opportunity to represent its constituents since information regarding the physical condition of the schools could have been obtained by the union from is members employed in those buildings.

that it cannot properly represent its members because of the denial of access. Nor has it alleged that the access was denied on a discriminatory basis. To the extent that the petition is claiming that the Petitioner was prevented from speaking fully about the African-American Day parade, we note that the Union has not demonstrated that promotion of the African-American Day parade is in any way related to the employment relationship. While a union has the right, under the NYCCBL, to represent public employees concerning wages, hours, and working conditions, it does not have the right to represent them concerning matters unrelated to the employment relationship. For this reason, an alleged denial of access for the purpose of discussing the African-American Day parade cannot be seen as an impediment to the union's ability to represent its members properly. To the extent that the petition is claiming that the City limited the subjects that the Petitioner could address, and consequently denied him the opportunity to address other employment related issues, the Union has not alleged what issues the Petitioner was prevented from discussing and has not alleged that this denial affected the Union's ability to represent its members properly.

For the foregoing reasons, we find that the Union's allegations fail to state a claim under 12-306a of the NYCCBL. Therefore, we will dismiss the improper practice petition in its entirety.

**ORDER**

Pursuant to the powers vested in the Board of Collective Bargaining it is hereby,

ORDERED, that the improper practice petition filed by Local 1182, Communications Workers of America be, and the same hereby is, dismissed.

Dated: New York, New York
September 26, 1996

Steven C. DeCosta
CHAIR

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Richard A. Wilsker
MEMBER

Saul G. Kramer
MEMBER

Jerome E. Joseph
MEMBER

Robert H. Bogucki
MEMBER